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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 297

HELEN BISCHOFF,

Petitioner,

vs.

NATHAN PERELES JR., ETC., Et Al,

Respondents.

ANSWER OF GUARDIAN AD LITEM TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

NATHAN PERELES JR.
Guardian and Attorney
739 North Broadway
Milwaukee, Wisconsin 53202

HAMILTON-SMITH-KORTMEYER CO. MILWAUKEE

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JURISDICTION

The respondent asserts that this Court lacks jurisdiction under 28 U.S.C. §1257(3) for the reason that the decision of the Wisconsin Supreme Court below is based on an adequate non-federal ground. Certiorari should be denied under Rule 19.

QUESTIONS PRESENTED

1. Assuming a state court errs in refusing to set aside on equitable grounds a release of a power of appointment motivated by the desire to save federal estate taxes, does

this present a federal question because of denial of due process or equal protection of the laws?

2. If the state court in a case of first impression adopts as the common law of the state a majority rule embodied in the Restatement of Property as promulgated by the American Law Institute, has the state court thereby improperly avoided a claim that state statutes validating the release impaired any obligation of contract or violated due process because retroactive?

STATEMENT

Respondent wishes to supplement the petitioner's statement of the case by adding the following facts from the record:

With reference to the release by Mrs. Josephine C. Hoyt of her power to appoint reserved by her and her brothers and sisters under the Trust Indenture, which release is dated February 25, 1944 and which was identical with the release executed by her brother and her sisters, the only living parties who created said Trust Indenture, the said release was transmitted to Mrs. Hoyt by attorneys for the said parties, Wood, Warner, Tyrrell & Bruce, in a letter dated February 21, 1944 and which closed with the following statement:

> "You must understand that by this instrument you forever limit your possible appointees to the persons within the limited class specified in the release. We suggest that you re-examine your will to be certain that it states your present desires in the matter."

The entire letter appears in Appellant's Appendix, Record Page 286 of the Wisconsin Supreme Court Record.

Attention is also directed to a letter from the same attorneys, dated January 19, 1944 in this matter, the last paragraph reading:

> "We call to your attention that before taking any action the subscribers should carefully consider the effect upon them of the release of their powers. The tax advantage must be weighed against any disadvantage resulting from the limitation upon or the complete loss of the power of appointment. For instance, if a subscriber now having natural issue should fully release his power and such issue should die, the subscriber would have no power to appoint someone else to receive his share of the dividends after his death, and such dividends would then go to the other subscribers or this issue. Such a subscriber might prefer to release his power only partially, in the same manner as suggested above for those subscribers who have adopted children, and thus run the rather slight risk of a change in the Regulations or in administrative policy referred to at page 5 above. The wishes of each individual subscriber in accordance with his own particular situation must, of course, govern his own decision in the matter. We shall be glad to discuss this practical phase of the matter with you if you so desire." (Ap. Appendix, Record p. 281, Ex. 10).

ARGUMENT

This case represents an attempt by petitioner to manufacture a federal question out of a purely private law case properly handled by the trial court and affirmed by the Wisconsin Supreme Court after full and elaborate argument by petitioner, with a rehearing denied without opinion. The case is very simply this: the state courts have found that a partial release of a testamentary power of appointment, executed in 1944 by Mrs. Hoyt, who retained the power over shares transferred by her into a

family trust in 1918, was valid under the common law of Wisconsin aside from a statute enacted in 1943 and amended in 1957 expressly authorizing release; that even though the partial release was executed in order to diminish federal estate taxes on Mrs. Hoyt's estate, the release was made under the guidance of Mrs. Hoyt's lawyers and was intended to have, and did have, significance apart from the tax consequences, whether or not tax savings were ultimately obtained; hence the partial release was effective and binding on Mrs. Hoyt and those claiming under her, and a later attempt by her to exercise in favor of petitioner the power which no longer existed was a nullity.

The only federal issue raised in the lower courts related to the constitutionality of Wis. Stat. 232.495 (1943) and the amended version of the same statute as enacted in 1957. Any due process question arising from the alleged retroactivity of a curative provision in the 1957 statute and alleged impairment of obligation of contract based on application of the 1943 or 1957 statutes to the release of a power created under the 1918 Trust Agreement were effectively eliminated from the case by the decision of the Wisconsin Supreme Court that the release was valid under the common law apart from the validating statutes. This non-federal ground is adequate to support the judgment. In affirming the trial court, the Wisconsin Supreme Court adopted as the common law of the state the prevailing rule regarding release as stated in the Restatement of the Law of Property, promulgated by the American Law Institute in 1948 and, in so doing, overruled no prior Wisconsin case law (1948 Supplement Topic 4 pages 504-508).

We contend that this Court lacks jurisdiction over the case and urge the Court to deny the petition for certiorari for the following reasons:

1. Refusal of the Wisconsin Supreme Court to reverse the trial court and order the release set aside in equity upon the grounds of mistaken reliance upon federal tax law was not a denial of due process or the equal protection of the laws. The decision of the Wisconsin courts, that there was in fact no mistake even though a subsequent change in the tax laws have made execution of the release unnecessary, was correct. The decision did not conflict with prior Wisconsin rulings, and even if it did, this would not raise a question of due process or equal protection. The decision was not arbitrary or discriminatory. Nor does the refusal of the Wisconsin Supreme Court to set aside the release raise a federal issue merely because the federal estate tax laws were a motivating factor in the transaction, or because the decision may conflict with decisions of other states, or because some of the members of this Court have expressed concern about the impact of tax changes.

2. The decision of the Wisconsin Supreme Court based on the common law of Wisconsin eliminated any question of the constitutionality of the Wisconsin Statutes relating to release of powers of appointment. This non-federal basis for the decision was an exercise of the judicial technique of avoiding unnecessary constitutional issues, advocated by this Court and practiced by every court dealing properly with grave constitutional issues. There was no "improper avoidance" of the federal question, since there was sound basis for the common law rule adopted by the Wisconsin Court in a case of first impression.

A.

NO DENIAL OF DUE PROCESS OR EQUAL PROTECTION OF THE LAWS

Both Congress and this Court have long recognized that it is not the function of this Court to sit in review of substantive matters of state law unless a federal question is involved. As Chief Justice White said in *McDonald v. Oregon Railroad and Navigation Company*, 233 U.S. 665 (1914):

> "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not . . . give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character."*

See also *Castillo v. McConnico*, 168 U.S. 674 (1898). Any other approach would convert all substantive law problems into federal questions under the guise of due process or equal protection.

However, since a claim of denial of due process and equal protection of the laws is not to be taken lightly, we deem it proper to analyze the substantive issues in some detail, in order to eliminate any question of arbitrary decision on the part of the Wisconsin Supreme Court. As we understand petitioner's claim, it is based on failure of the Wisconsin Supreme Court to grant relief on the basis of certain "equities" in petitioner's favor, allegedly contrary to established Wisconsin law dealing with mistake. It is fitting to start with the opinion of the Wisconsin court on this point:

> "We must first resolve whether the partial release of the power of appointment was effective. The exe-

*Followed in *Gasquet v. Lapeyre*, 242 U.S. 370, 61 L.Ed. 370 (1917)

> cution of the instrument by Mrs. Hoyt on February 25, 1944 was a deliberate and meaningful act. Prior to its preparation and execution, Mrs. Hoyt had the guidance of an analytical report from her lawyers; they recommended the partial release in order to diminish federal estate taxes on Mrs. Hoyt's estate. We consider that in the issue before us it is immaterial whether the tax savings which Mrs. Hoyt sought to obtain were ultimately obtained. The document had independent legal significance even though its purpose was to gain a specified tax benefit." 22 Wis. (2d) 198, 206.

In understanding this position of the court it is helpful to note certain factors: (1) the 1944 release by Mrs. Hoyt was undertaken only after careful deliberation on the basis of competent legal advice; (2) the release stated that it was irrevocable and Mrs. Hoyt was warned to consider the non-tax consequences of the release; (3) on the basis of then-known tax law there was no mistake; (4) the release could have achieved tax savings had Mrs. Hoyt died prior to the Powers of Appointment Act of 1951 or had Congress not changed the taxation of powers of appointment by that Act. The state courts quite properly decided that nothing in the Wisconsin case law regarding mistake would justify setting aside a document under such circumstances. The existing Wisconsin cases on mistake involved no fact situations remotely similar to this. The Wisconsin Supreme Court apparently regarded them as unworthy of mention in a situation where a party, competently advised by legal counsel, fully cognizant of the risks involved, and carefully warned to weigh both tax advantages and nontax consequences, deliberately executes a formal legal document. Relief for mistake is a highly intricate problem which courts of equity have always decided more or less on an individual case basis.

anyway. We do not believe that, under the concept of equal protection or due process or any other doctrine, this Court ever has or now wants to sit in review on state substantive law questions of this nature.

Petitioner, on pages 23-25 of her petition, attempts to manufacture a due process question out of an alleged conflict between the decision of the Wisconsin Supreme Court as to equitable relief and the decisions of three other states. The 14th amendment does not require any state to follow the decisions of other states on matters of local law. Moreover, upon careful analysis it will be seen that the conflict is more apparent than real. For example, petitioner relies heavily on *Stone v. Stone*, 319 Mich. 194, 29 N.W. 2d 271 (1947 — "a case without a substantive distinction". But in *Stone* the taxpayer found himself in the impossible situation of having transferred the right to partnership income and then being held still liable for taxes on the income which was no longer his (unless he were afforded relief by way of rescission). This was a clear case of hardship and a far cry from the instant case where Mrs. Hoyt had merely restricted her power of appointment by partial release to a power to appoint among her family group and where her estate would have realized tax advantages had she died prior to 1951 when the statute was changed. Even on the facts of the *Stone* case the decision was subjected to criticism in the law reviews on both doctrinal and policy grounds. See Note, 48 Col. L. Rev. 470 (1948); Note 61 Harv. L. Rev. 553, 554 (1948); Comment, 46 Mich. L. Rev. 1079 (1948).

Petitioner attempts to give some federal "color" to her claim by arguing that Mrs. Hoyt, in executing the release, relied to her detriment on both an erroneous interpretation of the federal estate tax law by this Court and

a federal tax statute which was later changed by Congress. We have no doubt the Court will readily see through this argument. Merely because federal taxes were one motivating factor, or even the sole motivating factor, in the transaction which petitioner seeks to set aside, does not make the entire transaction a federal issue. This is not a case involving interpretation of the federal tax statute or affecting the administration of federal tax law. Hundreds of ramifications of federal tax law are left to state law for determination. A simple and common example is the problem of impact of federal estate taxes on distribution of the decedent's estate. Here there is a wide difference in treatment between states, some imposing the burden on the residue, others applying statutory or decisional rules for apportionment among all beneficiaries, with the testator free to establish his own rule by testamentary provision. In order for a case to arise under a federal statute, it must have a far more direct connection with the statute than the cause of action in this case has.

Nor do the facts of the case support petitioner's claim. Petitioner states (p. 20): "We are concerned solely with rescission of such transfers where it can be shown the taxpayer relied to his detriment on an erroneous statutory construction by this Court. This is such a case." But the fact is that this is *not* such a case. It is true that Mrs. Hoyt executed the partial release in 1944 in light of the decision of *May v. Heiner*, 281 U.S. 238 (1931), which was subsequently overruled in *Commissioner v. Church*, 335 U.S. 632 (1949), but her own counsel had cautioned against the possibility that the Court might shift its position on this score (A. Ap. 194-195). And even had there been full reliance, no detriment would ever have resulted to Mrs. Hoyt or her estate therefrom. This is because prior to the time when this Court on its own

motion invited counsel in the *Church* case to discuss the reserved life estate, the Internal Revenue Department had made no effort to assess an estate tax on this basis alone. See Lowndes and Kramer, Federal Estate and Gift Taxes (2d ed. 1962) pp. 94-95; Warren and Surrey, Federal Estate and Gift Taxation (1961) ed. p. 444. Moreover, as Mrs. Hoyt's counsel properly pointed out in 1944, there would have been a strong argument of res judicata based on the ruling in *Helmholz v. Commissioner*, 28 B.T.A. 165 (1933) involving the same family trust, if Mrs. Hoyt had died between 1944 and 1949 and an attempt been made to tax the estate on the basis of the reserved life estate. Immediately after the decision in the *Church* case, Congress restored the rule of *May v. Heiner* by the Technical Changes Act of 1949 (63 Stat. 891). Thus any claim of detriment to Mrs. Hoyt by reliance on *May v. Heiner* was forever eliminated from this case.

The crucial tax question in 1944 was the section of the 1942 Revenue Act imposing a tax on the basis of Mrs. Hoyt's power of appointment unless it were released. Petitioner claims that Congress "induced" the release by the provisions of the tax law. Of course, this is a purely semantic attempt to place the blame on Congress for estate planning. The later change in the law relating to powers of appointment (the Powers of Appointment Act of 1951) exempting certain pre-1942 powers from taxation is the only reason Mrs. Hoyt might ever have considered questioning the validity of her own release! Surely this Court would not espouse a doctrine that, whenever Congress changes a tax law, persons can set aside — on the basis of "federal law" — fully executed transfers of property planned on the basis of the former law. Gifts are made, trusts are established, insurance is purchased, corporations are formed, investments are made, business

contracts are entered into, employment arrangements are accepted — all with some degree of reliance on existing federal tax law.* We join with petitioner and with the Justices of this Court who have expressed concern over the impact of change in tax structure. But this is a policy reason against sharp change in the tax laws and their interpretation. It is not a reason for converting into a federal question the complex property problem of unscrambling all the transactions made on the basis of a tax law later changed by Congress (or, for that matter, reinterpreted by this Court). Change is to be expected, and loss of flexibility is a risk all estate planners accept as a price of achieving tax minimization.

B.

NO CONTRACT OBLIGATIONS IMPAIRED

While a constitutional issue might be posed had the Wisconsin Supreme Court based its decision on the Wisconsin statutes relating to release, the Wisconsin Supreme Court quite properly avoided the issue by deciding the case on the alternative ground that, aside from statute, the release was valid under the common law of the State of Wisconsin. It is well established that the contract clause prohibits impairment only by subsequent legislation, not by judicial decision. *Tidal Oil Co. v. Flanagan*, 263 U.S.

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*While it is of course perfectly proper to take advantage of tax-saving provisions of the revenue laws, it would be unsound policy to encourage tax-motivated transfers by allowing rescission or revocation if such transfers later proved unsuccessful or unnecessary in achieving tax savings. Professor Walter Blum, in an article in the Journal of Taxation, Vol. 10, p. 300 (1959) dealing with the problem of arrangements contrived to minimize taxes, observed:

> "Furthermore, it may be that our system is deficient in not penalizing unsuccessful experiments more heavily than now in view of the costs, which they impose on the whole legal apparatus."

444 (1924); *Fleming v. Fleming*, 264 U.S. 29 (1924); *Barrows v. Jackson*, 346 U.S. 249 (1952).

Petitioner argues (p. 17, 23) that the Wisconsin Court "improperly avoided" the constitutional issue. But this Court has long approved the judicial technique of avoiding constitutional issues when unnecessary to the decision. This case in no way resembles *Davis v. Wechsler*, 263 U.S. 22 (1923) or *NAACP v. Alabama*, 357 U.S. 449 (1958) where novel state procedural requirements were made the basis of avoiding federal review of constitutional rights.

It ought to be a sufficient answer to petitioner's claim that the decision of the Wisconsin Supreme Court is based on a majority common law rule approved by the American Law Institute in its Restatement of Property and that petitioner can point to no prior Wisconsin case dealing with a power of appointment of this type. Unless for some reason this basis is untenable, this Court has no ground to review the decision. We do not need to remind the Court of its function in a case such as this. As Justice Stone said in *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930): "But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." See also *Demorest v. City Bank Co.*, 321 U.S. 36 (1944).

Petitioner urges that the chapter of the Wisconsin statutes dealing with powers (Wis. Stat. ch. 232), in force in 1918 when the trust agreement was entered into, foreclosed adoption of the common law and hence prevented release of any powers except those for which re-

lease is expressly authorized by statute. The Wisconsin Supreme Court failed to find any language in Sec. 232.01 or other sections of that chapter from which such an absurd conclusion could be drawn. No section of the statutes in 1918 prohibited release, and the "code" approach urged by petitioner, from which a negative inference might be raised, has been rejected in states adopting the New York property statutes. See Simes and Smith, Law of Future Interests (2nd ed.) 1081:

> "While one might infer from the language of the New York legislation that all common law doctrines concerning powers of appointment are abolished, it would seem that this is not actually the case. Actually the common law must be relied upon at times to interpret the language of the statutes and to fill gaps not covered by them."

See also Fowler, Real Property Law of the State of New York (3rd. ed.) 578; Chaplin, Express Trusts and Powers (1897) 422.

An additional reason is the express finding of the Wisconsin Supreme Court that no contract rights were involved here, that the power of appointment was a property right reserved by Mrs. Hoyt when she transferred her shares of stock into the Patrick Cudahy Family Trust, just as she reserved the income from such shares. Although recognizing that a trust such as the one here involved may embody contractural burdens amongst those who establish the trust, the Wisconsin Supreme Court correctly ruled: "We construe the provision for a power of appointment in the instant case to constitute a reserved property right in the settlor as distinguished from a contractural or primissory obligation with reference to the power." Mrs. Hoyt was under no obligation (contractural or otherwise) to exercise the power at all.

and no one else can claim that any right has been impaired.

Finally, were it relevant to the issue, we could demonstrate that the Wisconsin legislation as applied to pre-existing powers of appointment is perfectly valid. Without expanding, we merely call attention of the Court to *Chanler v. Kelsey*, 205 U.S. 466 (1906) holding that a state inheritance tax statute could apply to existing powers of appointment without contravening either due process or the contract clause; and to *Satterlee v. Matthewson*, 2 Pet. 380 (1829) and *Watson v. Mercer*, 8 Pet. 88 (1834) upholding state statutes validating prior property transactions on the grounds that giving effect to the intent of a party as to confirm, not impair, rights.

CONCLUSION

There is no substantial federal question affording a basis for jurisdiction of this Court. The petition should therefore be denied.

Respectfully submitted,

NATHAN PERELES JR.

Guardian ad litem for minors and *Attorney* for men in the military service.